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No. 84-433.

In the

Supreme Court of the United States.

OCTOBER TERM, 1984.

SCHOOL COMMITTEE OF THE TOWN OF BURLINGTON, MASSACHUSETTS, TOWN OF BURLINGTON, MASSACHUSETTS,
PETITIONERS,

v.

DEPARTMENT OF EDUCATION OF THE COMMONWEALTH OF MASSACHUSETTS, ROBERT PANICO a/k/a JOHN DOE, SR., AS HE IS NEXT FRIEND MICHAEL PANICO a/k/a JOHN DOE, JR.,
RESPONDENTS.

Petitioners' Reply Brief.

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Petitioners' Reply Brief.

Preface.

Holding to the implication of Rule 22.5 that a reply brief should be "addressed to arguments first raised in the brief in opposition," petitioners will avoid the temptation to respond to those arguments that merely attempt to meet the reasons for granting the writ advanced in the petition.

Facts.

In their brief in opposition at pp. 4-5, respondents suggest that petitioners have included facts not in the record. Respondents should know better. Petitioners opposed respondent Department of Education's application for preliminary injunction on the basis of the refusal of the parents to make Michael available for an evaluation (Record Appendix (hereinafter R.A.) I, pp. 44-50), and then sought summary judgment on the same ground (R.A. I, pp. 63-64). The First Circuit referred to these portions of the record in its opinion (A. 122a, 123a), and petitioners sought to correct the reference in their petition for rehearing at pp. 21-23. The parents have never sought to deny or explain this material. That Judge Zobel received no evidence at trial on this point is immaterial.

Petitioners stated that the parents enrolled Michael in the Carroll School "without seeking or obtaining permission from local or state educational authorities." Not only is the record devoid of any effort to obtain such permission but at the administrative hearing Mr. Panico submitted in written form, as well as orally, a chronology of Michael's progress through the Burlington school system. For the written chronology see R.A. IV, pp. 415-425; for the oral testimony see R.A. III, pp. 9-71 and pp. 166-267. He further testified at trial (R.A. II, pp. 3-3 - 3-85). At no time did he mention seeking permission from anyone to place Michael in the Carroll School. This is of particular import, since the written chronology deals in some detail with the events of the summer of 1979 between the time that the parents rejected the IEP on July 3, 1979 and the commencement of hearings on September 26, 1979 (R.A. IV, p. 423). In the circumstances, it is almost inconceivable that if Mr. Panico had asked permission from state or local authorities to enroll Michael in the Carroll School he would not have mentioned it.

Petitioners do not state that Michael suffered a severe illness in 1977 but in the ensuing year (Pet., p. 4). In fact, he suffered this serious illness in 1979, and it was the subject of detailed

testimony by Mr. Panico (R.A. III, pp. 49-50). With respect to the events of May 24, 1979, see R.A. II, pp. 3-31, 3-32 and R.A. III, pp. 539-540.

We recognize that the faults found by respondents in petitioners' statement of the case are at best peripheral to the issue of whether certiorari should be granted. We are aware that Rule 19.1 states that "requests to certify the record prior to action by the court on the petition for writ of certiorari . . . should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by this court." Being of opinion that, except as to question 6, the certification of the record is not essential in this case, petitioners will ask the court below to certify only pages 44 through 50 of Volume I of the Record Appendix (the only pages needed for question 6), with the understanding that if respondents are still dissatisfied with any facts alleged by petitioners and believe that the record is essential, they may under Rule 19.1 request that it be certified to the Court.

Argument.

The Petition for Certiorari Presents Issues Ripe for Consideration by This Court.

This "case" has been pending now for over five years and will soon reach the fifth anniversary of its hegira through the courts. There have been appeals from three interlocutory orders, and an appeal and cross-appeal from the judgment. The slip opinion of the First Circuit ran to sixty-two pages. The purpose of the lengthy opinion appears to have been to set forth definitively substantive and procedural EHA law in the First Circuit. There is not a single *finding* made by the District Court that the Court of Appeals found to be plainly wrong. It ruled that further findings were necessary, however, in three areas: (a) whether petitioners' alleged violations of Michael's rights were

serious (A. 138a); (b) which of the experts' supposedly conflicting diagnoses of Michael's condition was correct (A. 119a-120a); and (c) the "equitable" considerations that will determine the parents' right to damages *if* the 1979-1980 IEP prepared by petitioners is *again* found to be *appropriate* (A. 137a-138a).

Respondents argue that because there was a remand for further findings, certiorari should not be granted (Br. in Opp., pp. 6-11). A fair summary of reasons II and V for granting a writ is that findings need be made in none of these areas because they are not germane. As the First Circuit noted (A. 94a):

> The appellants urge as error the district court's refusal to give any weight to the hearing officer's determination that the Town violated numerous state substantive and procedural regulations plus several federal provisions in its handling of the child's special education. The Town's [Petitioners'] response is that findings concerning past practices regarding compliance with state educational standards and procedures were irrelevant to the question appropriately before the hearing officer, *viz.*, is the IEP proposed by the Town adequate and appropriate?

The argument that certiorari is not granted in cases in which an appellate court remands for further findings of fact is refuted by the cases. See, *e.g.*, *Burks* v. *United States*, 437 U.S. 1, 4-5 (1978); *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 45 (1979); *Town Court Nursing Center, Inc.* v. *Beal*, 586 F.2d 280 (3rd Cir. 1978), *rev. sub. nom O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773, 781 (1980), *on remand*, 626 F.2d 1114 (3rd Cir. 1980). Here, if petitioners prevail on any of the questions raised by their petition (except for Question 3), no further facts need be found. In a case as old, lengthy and complex as this one is, the avoidance of further trial proceedings is a basis for granting rather than denying review by certiorari. If petitioners do not prevail on questions 1,

2, 4, 5 or 6 and there is to be yet another trial, it is highly desirable to have the evidentiary scope of that trial clarified as question 3 seeks to clarify it.

So much would be true even if the First Circuit's opinion had not determined issues of EHA law in a manner radically different from that in which those issues have been determined by other circuits. It did, however, in at least four of its holdings: (a) that parental self-help to private education for a handicapped child is not a bar under 20 U.S.C. § 1415(e)(3) to obtaining reimbursement for the expenses of such education (A. 126a-133a); (b) that EHA creates a remedy for damages[1] resulting from an inappropriate placement (A. 133a-138a); (c) that a state may "punish" a local school district for past procedural violations by requiring it to fund private education for a handicapped child, even though Federal law requires placement in the least restrictive setting and even though the local school district has prepared an IEP designed to ensure an adequate education in such a setting (A. 124a, 138a); and (d) that even if the parents choose an inappropriate private school for the education of a handicapped child, they are still entitled to some damages if they prevail at the administrative level, 20 U.S.C. § 1415(b)-(d), and under "equitable" considerations may be entitled to damages from the date of placement to the date of judgment (A. 135a-137a).

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[1] Respondents attempt to distinguish between "reimbursement" of expenses for private-school tuition and related costs and "damages" (Br. in Opp., pp. 20 n.4, 26). In almost every case cited on p. 23 of the petition for the proposition that EHA does not create a remedy for damages, the damages sought were at least such reimbursement. See *Doe* v. *Anrig*, 692 F.2d 800, 809-810 (1st Cir. 1980); *Colin K.* v. *Schmidt*, 715 F.2d 1, 8, 10 (1st Cir. 1983); *Marvin H.* v. *Austin Independent School District*, 714 F.2d 1348, 1349-1350, 1352-1356 (5th Cir. 1983); *Anderson* v. *Thompson*, 658 F.2d 1205, 1208, 1214 (7th Cir. 1981); *Mount View-Los Altos Union High School District* v. *Sharron B.H.*, 709 F.2d 28, 30 (9th Cir. 1983). In *Miener* v. *State of Missouri*, 673 F.2d 969 (8th Cir. 1982) and *Powell* v. *Defore*, 699 F.2d 1078 (11th Cir. 1983) reimbursement was not part of the damages sought by the plaintiffs. See also *Rowe* v. *Henry County School Bd.*, 718 F.2d 115, 116, 119 (4th Cir. 1983); *Zvi D.* v. *Ambach*, 694 F.2d 904, 908 (2d Cir. 1982) (affirming denial of preliminary injunction which sought reimbursement); *Monahan* v. *Nebraska*, 645 F.2d 592, 598 (8th Cir. 1981) (same).

Respondents seem to concede that holdings (a) and (c) are found in the First Circuit's opinion and attempt to deny holding (b) by distinguishing between "reimbursement" and "damages."[2] See n.1, *supra*.

Their response (Br. in Opp., pp. 7-8) to holding (d) is:

> In discussing the right to reimbursement, the central issue presented by this petition, the Court of Appeals identified as a critical factor "the yet-to-come final decision in the case" (A. 126a). Only "if [the parents] are held to have acted appropriately" in placing the child in private school (A. 129a), will the District Court need to consider the parents' claim for reimbursement. Moreover, even if the parents prevail on remand, their right to reimbursement is not established by the decision of the Court of Appeals. Rather, the Court of Appeals simply discussed the factors to be considered by the District Court if and when the parents are found to have acted appropriately.

Petitioners disagree. The opinion states (A. 135a-136a):

> We hold, therefore, that where the final state administrative decision rules a town's proposed IEP inappropriate and orders the town to fund placement, and the parents have complied with and implemented that decision, a town or local educational agency is estopped from obtaining reimbursement [in this case of money paid under protest to the parents for private school tuition] for the time period, usually one year, covered by the state agency decision and order.

It then proceeds to discuss an argument supposedly made by respondents that petitioners should be estopped from seeking reimbursement, *i.e.*, from seeking to avoid paying damages,

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[2] Whether the plaintiffs in the cases cited on pp. 20 and 26 of the brief in opposition sought damages beyond "reimbursement" is immaterial. If they had been entitled to reimbursement, the courts presumably would have so held.

for the period up to the date of judgment,[3] even if the findings of the District Court concerning the 1979-1980 IEP were correct. Rejecting this argument, the First Circuit states (A. 137a):

> In *Brookline* [*Doe* v. *Brookline School Committee*, 722 F.2d 910 (1st Cir. 1983)], we recognized the *availability* of reimbursement to a prevailing party, 722 F.2d at 921; see also *Doe* v. *Anrig II*, 728 F.2d 30 at 31 but did not hold that reimbursement was *automatically* to be awarded as a result of prevailing on the merits. We view it then, as now, to be a matter of equitable relief, committed to the sound discretion of the district court.

In other words, the parents are absolutely entitled to be reimbursed for some private school tuition and may be entitled to retain moneys paid to them by petitioners for other private school tuition, even if their placement of Michael in the Carroll School was inappropriate, or so, at least, the First Circuit construes EHA.

None of the above-discussed holdings, which petitioners assail and which respondents seem reluctant to acknowledge, is the least bit "cloudy" in the present state of the record. See *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950) which is cited on p. 11 of the brief in opposition. The Court of Appeals faced the *Stemple* [*Stemple* v. *Board of Education*, 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981)] question, holding (a), "squarely", and ruled that parental self-help is not a bar to reimbursement (A. 127a).

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[3] In all fairness it must be said that respondents made no such argument at least in the form represented in the opinion. If by "estoppel," the Court meant to refer to the doctrine of equitable estoppel, such an argument would have bordered on the absurd. As Black's Law Dictionary, 648 (Revised 4th ed.) notes: "An estoppel arises when one is concluded and forbidden by law to speak against his own act or deed. *Gural* v. *Engle*, 128 N.J.L. 252, 25 A.2d 257, 261." At no time in this case have petitioners ever sought to speak against their own word or deed. If the reference was to estoppel by judgment (in this case, administrative decision), the short answer would be that no such estoppel operates with respect to a decision under review in the very proceeding in which review is sought.

The memorandum of decision in the District Court fully sets forth the circumstances of the decision to withdraw Michael from the Burlington Public Schools (A. 59a-60a); the nature of Michael's learning disability and special needs (A. 60a-61a); and the basis for the court's conclusion that the town had prepared an appropriate IEP and would have implemented it (A. 62a-63a, 66a-67a). The record plainly raises the question of whether holdings (b), (c) and (d) are correct.

Although it is true, as respondents assert (Br. in Opp., pp. 9-10), that no witness offered by petitioners has yet been barred from testifying in the District Court, what petitioners seek with respect to question 3 is, should the court reach the issue, reversal of the holding that persons who testified or might have testified at the administrative level are rebuttably presumed to be disqualified from testifying in the District Court (A. 115a). If there is to be yet another trial in the District Court, the time to review that holding is now. At any new trial, petitioners intend to offer the testimony of persons who at least arguably although not practicably could have testified at the administrative hearings. To argue that petitioners should offer the testimony of these witnesses in the District Court and, if it is excluded, make this the subject of yet another appeal is to pervert the whole concept of ripeness. In announcing a rule of presumptive disqualification, the First Circuit has set a precedent that for reasons stated at pp. 17-20 of the petition is almost certainly in conflict with 20 U.S.C. § 1415(e)(2). District Courts in the First Circuit are now required to follow that rule, and courts elsewhere may be seduced by it. It, too, is deserving of immediate review.

In sum, every circuit but the First has held that 20 U.S.C. § 1415(e)(3) bars self-held by a parent absolutely or except in the most unusual circumstances; no court, except the First Circuit, has conceived of private education for a handicapped child under EHA as an amercement for *past* procedural or substantive violations of State law, much less the trivial violations that appear on the face of the hearing officer's report,

and such a concept flies in the face of the purposes of EHA; every circuit to consider the issue, with the exception of the First and Ninth and the possible exception of the Seventh, has ruled that damages including reimbursement for private education are not available under EHA; no court, except the First Circuit has ruled that persons who might have testified at an administrative hearing under 20 U.S.C. § 1415(b)-(d) are presumptively barred from testifying in court under § 1415(e)(2), which states flatly that the court "shall hear additional evidence." These issues, except the evidentiary issues, have arisen in one form or another in most of the circuits, see pp. 13, 23, 27-28 of the petition; resolution of the conflicts between the decision of the First Circuit in this case and those decisions of the other circuits in conflict with that decision should be delayed no further.

Conclusion.

For the reasons given, the petition for writ of certiorari should be granted.

Respectfully submitted,

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